

GIRLS' SCHOOLS AFTER VMI: DO THEY MAKE THE GRADE?

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I. INTRODUCTION

Forty years after the United States Supreme Court held in *Brown v. Board of Education*¹ that racially segregated schools violate the Equal Protection Clause,² the Supreme Court in *United States v. Virginia*³ held that Virginia failed to justify the exclusion of qualified women from the Virginia Military Institute (VMI), a prestigious college with a powerful alumni network that has excluded women for 157 years.⁴ In a 7-1 opinion, the Court held that a state may not wholly exclude women from an important and unique educational program for which some are qualified, even if women on average are not suited or qualified for admission.⁵ The Court rejected Virginia's argument that men and women have different developmental and educational needs which justify excluding women from VMI and segregating them in a separate and non-military "leadership" program at Mary Baldwin College, a private women's college.⁶ The Citadel, the only other all-male public college, conceded defeat in its battle to preserve its all-male tradition immediately after the decision was announced; VMI followed suit three months later.⁷

Less than one month after the Supreme Court held that VMI's gender-based admission policy violated the Equal Protection Clause, public school officials in New York City announced their decision to open a new public school for girls in September 1996.⁸ The school, named the Young Women's Leadership School (YWLS), was proposed and developed by Ann Rubenstein Tisch, a prominent philanthropist and former television reporter, with the support of a conservative educational thinktank, the Manhattan Institute for Educational Innovation, well known for its support of school vouchers and other efforts to privatize public schools.⁹

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1. 347 U.S. 483 (1954).

2. U.S. CONST. amend. XIV, § 1.

3. *United States v. Virginia*, 116 S. Ct. 2264, 2287 (1996) [hereinafter *VMI V*].

4. *See id.* at 2284.

5. *See id.* at 2282-86.

6. *See id.* at 2279-82.

7. *See* Mike Allen, *Defiant V.M.I. to Admit Women, But Will Not Ease Rules for Them*, N.Y. TIMES, Sept. 22, 1996, at A1.

8. *See* Jacques Steinberg, *Central Board Backs All-Girls School*, N.Y. TIMES, Aug. 22, 1996, at B3.

9. *See id.* Ms. Tisch and her husband reportedly have not donated any funds for the school, but

The argument in favor of single-sex schools for girls seeks to distinguish all-female schools, which many claim serve a compensatory purpose, from all-male schools. Unlike *Brown*, *VMI* did not consider whether the separate but equal doctrine from *Plessy v. Ferguson*¹⁰ was nevertheless constitutional when applied to schools segregated by sex. Advocates of single-sex schools for women argue that *VMI* and The Citadel unlawfully denied women access to unique opportunities based upon traditional beliefs that women are not suited for the military,¹¹ but all-female schools maximize the learning environment for young girls, whom they claim learn better in single-sex schools.¹²

While the existence of a "chilly classroom"¹³ denies many girls equal educational opportunity, the decision to resegregate public schools is neither a constitutional nor a desirable remedy. While the Supreme Court suggested in dicta in *VMI* that certain women's colleges might be justified under a compensatory rationale,¹⁴ it also held that a state may not exclude qualified students based upon the "average" abilities or alleged needs of male and female students.¹⁵ As the Supreme Court recognized in *VMI*, the arguments for single-sex schools rest upon the same gender stereotypes and generalizations used throughout history to exclude women from public education and traditionally male professions.¹⁶ The Young Women's Leadership School is no exception. Its founders rely on the precise stereotypes and generalizations about women as The Citadel and *VMI* did:¹⁷ girls, they assert, learn differently from boys.¹⁸

The segregation of public schools on the basis of gender resurrects a classificatory scheme that represents gender difference as natural and essential. State sponsored segregation perpetuates the mistaken belief that women are inherently different from men, not only in their cognitive abilities but in temperament, personality, and psychology.¹⁹ Unlike affirmative action plans that seek to increase women's inclusion in the public sphere, segregating young women in separate schools invokes the history of "separate spheres" used to restrict women's place and opportunities in society.²⁰

have pledged to recruit businesses, universities, and hospitals to create internships for its female students. *See id.*

10. 163 U.S. 537 (1896).

11. *See* Brief of Twenty-Six Private Women's Colleges as Amici Curiae in Support of Petitioner at 12, *VMI V*, 116 S. Ct. 2264 (Nos. 94-1941, 94-2107) [hereinafter Women's College Brief].

12. *See* Brief Amicus Curiae of the Employment Law Center et al., *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) (describing education programs designed for girls and women as "vehicles for promoting full inclusion and integration . . .").

13. *See* ROBERTA M. HALL & BERNICE R. SANDLER, *THE CAMPUS CLIMATE: A CHILLY ONE FOR WOMEN* 3 (1982) (describing the "chilly" climate and its effects on all students).

14. *See VMI V*, 116 S. Ct. at 2276-77.

15. *See id.* at 2280.

16. *See id.* at 2280-81.

17. *See id.*

18. *See* Steinberg, *supra* note 8, at B3 (describing research cited by the school board showing poorer performance by girls in coeducational settings); *see also* discussion *infra* notes 43, 143-47 and accompanying text.

19. *Cf. VMI V*, 116 S. Ct. at 2280-81.

20. *Cf. id.* at 2280; *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that "separate but equal" was constitutional with regard to race).

To reinforce the doctrine of separate but equal is to further entrench the cultural myth of difference that renders distinctions and discrimination against women as natural and essential.²¹ We are right to be concerned about the education and welfare of our daughters. Rather than reinstate the educational segregation of women, however, we should pursue educational reforms which foster inclusion and respect, and simultaneously teach girls and boys to reject stereotypes based on gender.

II. UNMASKING GENDER DIFFERENCE AS EXCLUSION

A. Constitutional Scrutiny of Race and Gender Based Classifications

In *Brown*, the Supreme Court rejected the separate but equal doctrine of *Plessy v. Ferguson*,²² holding that separate schools for black children were inherently unequal.²³ In condemning racial segregation in education, the Court recognized that classifying students based on their race reinforced their exclusion from socioeconomic opportunities in life.²⁴ The Court held that access to education was critical to prepare children for success in life and was "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."²⁵ In addition to denying black children equal opportunity, the process of racial segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."²⁶ *Brown* recognized the power of classificatory schemes to distinguish and stigmatize racial minorities and to perpetuate the exclusion of persons of color from social institutions, such as public education, which are gatekeepers for social and economic opportunity.²⁷

Unlike racial classifications, gender classifications have not been treated by the courts as inherently suspect.²⁸ While *Brown* held that racially segregated public schools violate the Equal Protection Clause²⁹ under the highest level of scrutiny known as strict scrutiny, the Supreme Court has not held that single-sex schools' must meet this tough standard. In its 1982 decision in *Mississippi University for Women v. Hogan*,³⁰ the Supreme Court considered whether the exclusion of men from an all-female nursing school violated the Equal Protection Clause. *Hogan* held that a state may segregate public educational programs on

21. Cf. *VMI V*, 116 S. Ct. at 2279 (discussing the district court's findings of "gender based developmental differences.").

22. 163 U.S. 537 (1896).

23. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

24. See *id.* at 493-94.

25. *Id.* at 493.

26. *Id.* at 494.

27. See *id.* at 493.

28. If a classification is inherently suspect it is subject to strict scrutiny. See William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27, n.29 (1997) (describing the three levels of constitutional scrutiny for equal protection: rational basis, intermediate scrutiny, and strict scrutiny).

29. U.S. CONST. amend. XIV, § 1.

30. 458 U.S. 718 (1982).

the basis of gender so long as a state proves an “exceedingly persuasive justification” to justify differential treatment based on sex.³¹ While a gender classification cannot be based on overly broad stereotypes or generalizations, the Court held that a gender classification that is substantially related to a “benign, compensatory purpose” might survive scrutiny.³² In the case of Mississippi University for Women’s (MUW) female nursing school, however, the Court held that Mississippi had not proven that the exclusion of men from a nursing school served such a compensatory purpose.³³ Justice Sandra Day O’Connor, writing for the majority, concluded that women were overrepresented in the nursing profession and that Mississippi had failed to show that, at the time that MUW opened, women lacked opportunities to obtain training or leadership positions in nursing, or that currently women were deprived of such opportunities.³⁴ The Court concluded that MUW’s single-sex policy did not compensate for discriminatory gender barriers, but perpetuated the stereotype that women were better suited for nursing than men.³⁵

The Court’s failure to treat classifications based on gender the same as those based on race contradicted its explicit and repeated recognition of the similarity in the historical exclusion of both groups. The Supreme Court first recognized the history of discrimination against women in 1973, in *Frontiero v. Richardson*.³⁶

[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself “preservative of other basic civil and political rights”—until adoption of the Nineteenth Amendment half a century later.³⁷

However, in applying the rational basis test for classifications based on gender, the courts upheld a host of discriminatory state policies, including laws

31. See *id.* at 724; see also Cynthia Fuchs Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and The Citadel*, 4 DUKE J. GENDER L. & POL’Y 101, 105 n.31 (1997).

32. See 458 U.S. at 728 (citation omitted).

33. See *id.* at 729.

34. See *id.*

35. See *id.* at 729-30.

36. 411 U.S. 677, 685 (1973) (citation omitted).

37. *Id.* at 685.

that excluded women from, among other things, practicing law³⁸ and serving on juries.³⁹

Two years earlier, the Supreme Court had raised the level of scrutiny for gender classifications in *Reed v. Reed*.⁴⁰ This heightened level of scrutiny, now known as intermediate scrutiny, was still an easier test than strict scrutiny used for racial classification. In *Reed v. Reed*, the court held that a state must demonstrate that a sex-based classification is substantially related to an important state purpose.⁴¹ The Supreme Court did not explain its reasons for subjecting gender classifications to less scrutiny than racial classifications, leading to widespread criticism by courts and commentators alike that intermediate scrutiny is indeterminate.⁴² Absent judicial gloss, many lower courts have interpreted intermediate scrutiny to reflect the Court's judgment that there are fundamental differences between men and women that justify more deferential review than racial classifications.

B. Gender Classifications in VMI and The Citadel

In defending its historical exclusion of women, VMI justified denying women access to its valuable and important educational program by constructing its argument around the same myth of difference relied upon in *Bradwell* and other pre-*Reed* cases.⁴³ VMI and The Citadel were the only remaining public col-

38. See *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872). Justice Bradley concurred in the Court's decision upholding the exclusion of women from the practice of law, finding that:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Id. at 141 (Bradley, J., concurring). By rationalizing the exclusion of women based upon their assumed attributes and different roles as wife and mother, this "attitude of 'romantic paternalism' . . . put women, not on a pedestal, but in a cage." *Frontiero*, 411 U.S. at 684 (citation omitted).

39. See *Strauder v. West Va.*, 100 U.S. 303 (1880). In *Strauder*, the Supreme Court held that the exclusion of African American men from juries violated the Fourteenth Amendment, but emphasized that a state "may confine the selection [of jurors] to males" *Id.* at 310. Under English common law, women were excluded from juries under "the doctrine of *propter defectum sexus*, literally, the 'defect of sex.'" *J.E.B. v. Alabama*, 511 U.S. 127, 132 (1994) (citation omitted). American courts that excluded women held that women were "too fragile and virginal to withstand the polluted courtroom atmosphere." See *Bailey v. State*, 219 S.W.2d 424, 428 (Ark. 1949) ("Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady.").

40. 404 U.S. 71 (1971).

41. See *id.* at 76 ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'") (citation omitted).

42. See, e.g., DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 91 (1989) ("The doctrinal legacy of the 1970s is an intermediate standard that recognizes the legitimacy of some gender classifications without a theory about which are legitimate and why.").

43. The United States filed suit against VMI and the Commonwealth of Virginia in 1990, alleging that VMI's male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment. See *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *on remand*, 852 F. Supp. 471 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995), *rev'd*, 116 S. Ct. 2264 (1996) [hereinafter *VMI I*].

leges in the United States that offered either a military-style or males-only education.⁴⁴ VMI and The Citadel cadets live in barracks in a military-style environment, similar to the federal service academies, which subjects cadets to mental stress, physical rigor, lack of privacy, and a stringent honor code.⁴⁵ Both VMI and The Citadel occupy a unique place in Southern history and culture. The Citadel was founded before the Civil War to protect white society from slave revolts.⁴⁶ VMI cadets fought federal troops in the Civil War at New Market, Virginia.⁴⁷ VMI and The Citadel offer their male graduates access to a host of socioeconomic and political opportunities through their powerful alumni networks, which boast military generals, prominent politicians, and business leaders.⁴⁸

Unlike MUW, VMI did not claim that its exclusionary policy served a compensatory purpose. Relying largely on theories of difference espoused by some feminists, VMI constructed its defense around the myth of gender difference.⁴⁹ VMI and The Citadel both bolstered their respective claims of difference⁵⁰ with the research and literature of prominent feminist social scientists,⁵¹ such as Carol Gilligan, who posits that men and women have different styles of moral reasoning and thinking.⁵² Feminist attempts to celebrate the stereotypical attributes of gender assigned to females thus were co-opted by defendants who sought to deny women equal access and opportunity. Their experts testified that fundamental physical, psychological, and developmental differences between men and women make VMI's military-style education inappropriate for most women.⁵³ These "physiological and sociological differences" between men and women are "real" and "not stereotypes."⁵⁴ VMI's experts argued that college age men have more self confidence than college age women, tend toward more impulsive and risk taking behavior, and need a more structured and competitive learning environment.⁵⁵ Women, however, are "more nurturing and concerned with relationships than men, who are concerned with formal rules and authority."⁵⁶ According to The Citadel's argument, "men are significantly more com-

44. See *2 Soldiers' Daughters to Enter Citadel*, N.Y. TIMES, Aug. 5, 1996, at A9.

45. See *VMI V*, 116 S. Ct. at 2270; *Faulkner v. Jones*, 10 F.3d 226, 236 (4th Cir. 1993) ("The Citadel provides a remarkably similar, if not identical, program [to VMI's].").

46. See Susan Faludi, *The Naked Citadel*, NEW YORKER, Sept. 1994, at 62, 66. (discussing The Citadel's military tradition and culture).

47. See *United States v. Virginia*, 976 F.2d 890, 892 (4th Cir. 1992) [hereinafter *VMI II*].

48. See *VMI V*, 116 S. Ct. at 2285; see also Valorie K. Vojdik, *At War: Narrative Tactics in The Citadel and VMI Litigation*, 19 HARV. WOMEN'S L.J. 1, 1 (1996).

49. See Deposition of Carol Gilligan at 1-3, *Johnson v. Jones*, 42 F.3d 1385 (4th Cir. 1994) No. 2:92-1674-2 (D.S.C.) (Jan. 7, 1993) (No. 2:92-1674-2).

50. See *id.*

51. See Vojdik, *supra* note 48.

52. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 22 (1982) ("Given the differences in women's conceptions of self and morality, women bring to the life cycle a different point of view and order human experience in terms of different priorities.").

53. See *VMI V*, 116 S. Ct. at 2283-84.

54. *Id.*

55. See Vojdik, *supra* note 48, at 6 n.38 (citations omitted).

56. *Id.* at 6.

petitive and aggressive; women place much greater emphasis on relationships and cooperation,” and “men display the trait of dominance more than women.”

As a result of these gender differences, the defendants argued, women were not suited to the stressful military-style education offered at VMI (or The Citadel for that matter), which was “not designed to accommodate the developmental needs of the vast majority of college age women.”⁵⁷ The Citadel claimed that “[a]dversative instructional techniques are not optimal for instilling confidence in college age women and maximizing their potential.”⁵⁸ In fact, The Citadel claimed that its system of education “would not be optimal for even the most aggressive and competitive women in the country.”⁵⁹ The Citadel concluded that “[f]or most girls and women, The Citadel’s system of ritualistic discipline and experiences would be meaningless.”⁶⁰ The VMI experts urged that “[g]iven these developmental differences females and males characteristically learn differently.”⁶¹ They explained that “[m]ales tend to need an environment of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor.”⁶² On the other hand, “[f]emales tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students.”⁶³ It was argued that the “nature of an experience that is growth-producing for a number of women is one that is supportive, is one that emphasizes positive motivation.”⁶⁴

Along with invoking the myth of gender difference, both VMI and The Citadel denied that their arbitrary exclusion of women discriminated against women.⁶⁵ VMI attempted to mask its exclusion of women by redefining itself as a single-sex college rather than a traditional male military college,⁶⁶ ignoring the unique history and place in Southern society and tradition that VMI holds.⁶⁷ The VMI experts argued that single-sex education is extremely beneficial for both men and women because of the ability to work “without the intrusion of any sexual tension,” and because “[s]tudents of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience.”⁶⁸ Echoing the claims of supporters of women’s schools, VMI argued that all-female schools “increase the chances that women will obtain positions of leadership, complete the baccalaureate degree, and aspire to higher degrees,”

57. See Citadel Defendants’ Proposed Findings of Fact at 45, *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994) (No. 2:93-488-2) [hereinafter Proposed Findings of Fact].

58. *Id.* at 51.

59. *Id.* at 52.

60. *Id.* at 53.

61. *VMI I*, 766 F. Supp. at 1434.

62. *Id.*

63. *Id.*

64. *Id.*

65. See *id.* at 1412-14; *Faulkner v. Jones*, 858 F. Supp. 552, 554-55 (D.S.C. 1994), *aff’d in part, modified in part*, 51 F.3d 440 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1996).

66. See *VMI I*, 766 F. Supp. at 1415.

67. *Id.* at 1434.

68. *Id.* at 1435.

and that students would be “more likely to take the risk of choosing a career normally associated with the other sex.”⁶⁹

The Citadel argued that single-sex education is particularly important to women in the fields of math and science, because “young men tend to dominate coeducational schools [and] [s]tatistically, males have higher math aptitude scores than females.”⁷⁰ Women who attend single-sex colleges, The Citadel asserted, “are more likely to enter traditional male fields of math and sciences.”⁷¹ Because adolescent girls care about “what boys think of them,” they “dare not do well” in math and science, for fear of “threaten[ing] boys.”⁷² The Citadel and VMI concluded that providing women with the non-military “leadership” programs at Mary Baldwin College in Virginia and Converse College in South Carolina would better meet the educational needs of most women.⁷³ In contrast, VMI and The Citadel claimed that the admission of women to their programs would materially change and destroy these military colleges, which were designed for men.⁷⁴ The current president of VMI, Major General Josiah Bunting III, also a witness for The Citadel, testified that the admission of women would be a “toxic kind of virus” that would materially change and destroy The Citadel.⁷⁵

Throughout the litigation, VMI and The Citadel argued that the fate of all women’s colleges turned on whether these traditional military colleges could remain all-male. In an ironic twist of gender confusion, these historically male institutions, which “not only practice[] inequality, but celebrate[] it,”⁷⁶ adopted the arguments historically made by Smith College and Wellesley College in support of all-female schools.⁷⁷ Ignoring the history of single-sex education as exclusive, the defendants claimed that the issue was whether single-sex education benefits students, not whether a state could continue to deny qualified women admission to a traditional military-style college.⁷⁸ The degendering of VMI and The Citadel provided its supporters with a springboard to argue that extending

69. *Id.*

70. See Proposed Findings of Fact, *supra* note 57, at 62.

71. *Id.*

72. *Id.* at 63.

73. See *United States v. Virginia*, 852 F. Supp. 471, 478-80 (W.D. Va. 1994), *aff’d*, 44 F.3d 1229 (4th Cir. 1995), *rev’d*, 116 S. Ct. 2264 (1996) [hereinafter *VMI III*]; see also Proposed Findings of Fact, *supra* note 57, at 52.

74. See *VMI I*, 766 F. Supp. at 1412-13; *VMI II*, 976 F.2d at 896; *Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993).

75. See *Vojdik*, *supra* note 48, at 14 (citation omitted). Virginia’s argument that offering single-sex education at VMI contributed to diversity in education was the same argument raised by Justice Powell in his dissent in *Hogan*, where he asserted that Mississippi could justify excluding men from MUW because it was providing women a “choice” of educational environments. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 742-43 (1982) (Powell, J., dissenting). The majority disagreed, explaining that the issue was not whether the favored gender benefits, but whether the classification was substantially related to an important government objective. See *id.* at 724, 731.

76. *Faulkner*, 10 F.3d at 234 (Hall, J. concurring).

77. The narrative techniques employed by The Citadel and VMI are discussed in more detail in *Vojdik*, *supra* note 48, at 4-8.

78. See, e.g., *VMI I*, 766 F. Supp. at 1414-15; *Faulkner v. Jones*, 858 F. Supp. 552, 564 (D.S.C. 1994).

admission to these traditionally male bastions would similarly result in the demise of women's colleges.⁷⁹

C. VMI: The Decisions

VMI's attempt to defend the exclusion of women by relying on claims of difference and the need to preserve single-sex education eventually succeeded in both the district court⁸⁰ and the court of appeals.⁸¹ Judge Jackson Kiser in the Western District of Virginia held that VMI's exclusion of women substantially furthered Virginia's interest in providing diversity within Virginia's educational system by offering single-sex education, which the court found benefits both men and women.⁸² Accepting the stereotypes of men and women offered by VMI, the district court further found that, while some women might succeed at VMI, the adversative method was inappropriate for the vast majority of women.⁸³ According to the district court, VMI's claims of difference were not stereotypes or overly broad generalizations, but real differences between men and women.⁸⁴ The district court further found that women would change VMI's adversative⁸⁵ method and thereby destroy the school.⁸⁶ Specifically, the court found that VMI would be required to make allowances for personal privacy, alter its physical education requirements for women, and change its adversative environment.⁸⁷

On the case's first appeal, the Fourth Circuit Court of Appeals reversed the district court, holding that Virginia had "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type education to men and not to women."⁸⁸ While the Fourth Circuit agreed that single-sex education provides important pedagogical benefits to both men and women, it concluded that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women"⁸⁹ The Fourth Circuit agreed with VMI, however, that "[m]en and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated."⁹⁰ Given these differences, the Fourth Circuit concluded that the admission of women would materially change VMI and refused to order VMI to admit women in light of the "generally recognized

79. Amici for VMI also warned that requiring VMI to admit women would likewise disable women's colleges from remaining all-female. See, e.g., Brief of Amici Curiae States (Wyoming and Pennsylvania) in Support of the Commonwealth of Virginia at 11-17, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107); Brief of Mary Baldwin College as Amicus Curiae in Support of Respondents at 20-29, *VMI V* (Nos. 94-1941, 94-2107) [hereinafter *Mary Baldwin Brief*].

80. See *VMI I*, 766 F. Supp. 1407.

81. See *VMI II*, 976 F.2d 890.

82. See *VMI I*, 766 F. Supp. at 1414-15.

83. See *id.* at 1412-13.

84. See *id.* at 1434-35.

85. See *supra* note 45 and accompanying text; see also Hurd, *supra* note 28, at 28-29.

86. See *VMI I*, 766 F. Supp. at 1412-13.

87. See *id.*

88. *VMI II*, 976 F. Supp. at 899.

89. *Id.* at 899.

90. *Id.* at 897.

benefit that VMI provides.”⁹¹ Instead, it remanded the case to the district court to permit Virginia to propose a remedial alternative, which could include coeducation, going private, the establishment of “parallel” programs or institutions, or “other more creative options.”⁹²

On remand, Virginia refused to admit women to VMI and instead proposed the establishment of a separate, and deliberately different, program for women at Mary Baldwin College, a private women’s college about thirty miles from VMI.⁹³ The Virginia Women’s Institute for Leadership (VWIL) at Mary Baldwin is not a military program like VMI, and bears virtually no resemblance to the rigorous program at VMI.⁹⁴ VWIL does not have a barracks lifestyle,⁹⁵ which is the heart of VMI.⁹⁶ Rather than emphasize stress and adversity like VMI, the VWIL program focuses on “cooperative method[s],” which defendants contended were more suitable for women, who lack the confidence and self-esteem of men.⁹⁷

The district court approved the VWIL plan, even though it found that the Mary Baldwin proposal “differs substantially”⁹⁸ from the VMI program and that “if ‘separate but equal’ is the standard by which the Commonwealth’s plan must be measured, then it surely must fail”⁹⁹ While the methodologies of VMI and Mary Baldwin differed, the court found that the end results would be “comparable.”¹⁰⁰ Invoking the rhetoric of “separate but equal,” Judge Kiser concluded: “If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.”¹⁰¹ The Fourth Circuit affirmed in a 2-1 decision.¹⁰² The panel majority applied a new “special intermediate scrutiny test” under which a state could provide separate educational programs for men and women as long as the benefits provided to each gender were “substantively comparable” and did not tend “to lessen the dignity, respect, or societal regard of the other gender.”¹⁰³

On appeal, the Supreme Court reversed, stating that its caselaw “reveal[s] a strong presumption that gender classifications are invalid.”¹⁰⁴ Citing its decision in *Hogan*, the majority held that a state must show “at least that the [challenged] classification serves ‘important governmental objectives and that

91. See *id.* at 900.

92. See *id.* The Supreme Court denied certiorari. See *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993).

93. See *VMI III*, 852 F. Supp. at 476-77.

94. See *id.* at 477-78.

95. See *id.*

96. See *VMI V*, 116 S. Ct. at 2283.

97. See *VMI III*, 852 F. Supp. at 476.

98. See *id.* at 473.

99. *Id.* at 475.

100. See *id.* at 473.

101. *Id.* at 484.

102. See *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995), *rev’d*, 116 S. Ct. 2264 (1996) [hereinafter *VMI IV*].

103. *Id.* at 1237.

104. *VMI V*, 116 S. Ct. at 2275 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring)).

the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"¹⁰⁵ Consistent with its skeptical view of discriminatory gender classifications, the Court further held that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."¹⁰⁶

While the Court observed that there are physical differences between men and women that might justify differential treatment, it held that so-called average differences in the abilities, traits, and interests of men and women do not justify the state sponsored exclusion of women. A state may adopt sex-based classifications "to compensate women 'for particular economic disabilities [they have] suffered,' to 'promote equal employment opportunity,' [or] to advance full development of the talent and capacities of our Nation's people."¹⁰⁷ Such classifications may not be used, however, "to create or perpetuate the legal, social, and economic inferiority of women."¹⁰⁸ Thus, *VMI* narrows the range of permissible uses of gender and claims of gender difference as bases for state classifications.

The Court was openly skeptical in examining *VMI*'s proffered justification, recalling the history of women's disenfranchisement and exclusion from the public sphere, including higher education, and dismissing *VMI*'s defense as a *post hoc* rationalization of its desire to remain all-male.¹⁰⁹ First, the Court rejected Virginia's assertion that the exclusion of women from *VMI* was substantially related to providing a diverse range of educational programs, including single-sex colleges.¹¹⁰ While Virginia claimed that the absence of any single-sex school for women was "an historical anomaly," the Court found that history proved otherwise.¹¹¹ The Court recounted in detail Virginia's refusal to provide higher education to daughters, which Virginia considered to be "dangerous" for women; then providing women with schools that lacked equal resources and stature to men's schools; and finally transforming all of its public colleges from single-sex schools into coeducational institutions, except for *VMI*.¹¹² Moreover, the Court held that a purpose that "genuinely" sought to provide educational diversity was not served by *VMI* offering its unique program only to men.¹¹³

The Court likewise rejected Virginia's argument that there are "gender-based developmental differences" that would require *VMI* to materially change its methodology if women were admitted.¹¹⁴ Reciting its earlier decisions in *Hogan* and *J.E.B. v. Alabama*, the Court reiterated that state actors may not exclude qualified individuals based on stereotypes or generalizations concerning

105. *Id.* (emphasis added) ((citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citation omitted)).

106. *Id.* (citations omitted).

107. *Id.* at 2276 (citations omitted).

108. *Id.*

109. *See id.* at 2274-78.

110. *See id.* at 2278-79.

111. *See id.* at 2278.

112. *See id.* at 2277-78.

113. *See id.* at 2279.

114. *See id.* at 2279-80, 2283 (quoting *VMI I*, 766 F. Supp. at 1434-35).

the roles and abilities of men and women.¹¹⁵ Although the lower courts found that the admission of women would materially change VMI, the Supreme Court rejected the argument that women would destroy VMI as a “self-fulfilling prophec[y]” no different than similar arguments used throughout history to deny women access to male-only education, the military, and many professions, including the law.¹¹⁶

The Court similarly rejected Virginia’s remedial proposal to create an all-female alternative to VMI at Mary Baldwin that did not offer women rigorous and stressful military training, but instead provided a “‘cooperative method’ of education ‘which reinforces self-esteem.’”¹¹⁷ The Court held that Virginia could not justify these pedagogical differences based on alleged “important differences between men and women in learning and developmental needs.”¹¹⁸ Such generalizations about “the way women are” or what is “appropriate for *most women*” do not justify “denying opportunity to women whose talent and capacity place them outside the average description.”¹¹⁹ The Court also held that the VWIL program was a “‘pale shadow’ of VMI” in terms of its curricular offerings, “faculty stature, funding, prestige, alumni support and influence.”¹²⁰ The Court compared Virginia’s creation of the Mary Baldwin program to Texas’ attempt 50 years ago in *Sweatt v. Painter*¹²¹ to create a law school for black students rather than integrate the University of Texas. Under *Sweatt*’s analysis, Virginia had failed to provide “substantial equality in the separate educational opportunities the State supports at VWIL and VMI.”¹²²

In rejecting VMI’s claim of gender differences, the Court ignored the factual findings of the lower courts that men and women have different developmental

115. See *id.* at 2280; see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994).

116. See *VMI V*, 116 S. Ct. at 2280-81.

117. *Id.* at 2283 (quoting *VMI III*, 852 F. Supp. at 476).

118. *Id.*; see also Brief for Respondent at 28, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107). Chief Justice Rehnquist concurred, but noted that, unlike the majority, he did not believe that the only remedy available to VMI was coeducation. Justice Rehnquist, who dissented in *Hogan*, described the violation in *VMI* not as the exclusion of women from VMI, but rather Virginia’s decision to offer an all-male school without a “corresponding” institution for women. See *VMI V*, 116 S. Ct. at 2290 (Rehnquist, C.J., concurring). In Rehnquist’s opinion, an adequate remedy would not be limited to admitting women to VMI or providing a “VMI clone for women,” but could include “a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution.” *Id.* at 2291. A state need not create two institutions with the same curriculum, number of faculty Ph.D.s, or comparable athletic fields; one school could emphasize computer science and the other liberal arts. See *id.* It would be sufficient if the two institutions “offered the same quality of education and were of the same overall calibre.” *Id.* In the case of VMI, Rehnquist concluded that the VWIL plan failed as a remedy because it was “distinctly inferior to [VMI] and will continue to be for the foreseeable future,” and “is not, in any sense, the institution that VMI is.” *Id.*

119. *Id.* at 2284.

120. *Id.* at 2285. The Court first held that, under well-established desegregation case law, Virginia must provide a remedy that puts women in “the position they would have occupied” absent the discriminatory conduct, “eliminate[s] [so far as possible] the discriminatory effects of the past,” and “bar[s] like discrimination in the future.” See *id.* at 2282 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Louisiana v. United States*, 380 U.S. 145, 154 (1965)).

121. 339 U.S. 629 (1950).

122. *VMI V*, 116 S. Ct. at 2286.

and educational needs.¹²³ Its analysis largely rested on the right of the individual to equal opportunity.¹²⁴ The Court held that a state may not deny to women who have the will and capacity the unique training and opportunities offered at VMI, and that Virginia's justification for excluding all women from VMI's training, for which some women are qualified, "cannot rank as 'exceedingly persuasive.'"¹²⁵ Emphasizing the right of each person to be judged as an individual and not based on his or her sex, the Court held that the asserted goal of creating citizen-soldiers "is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit," from VMI's prestigious program.¹²⁶

While the majority in *VMI* did not address the issue of strict scrutiny (which the United States argued for the first time on appeal), Justice Scalia, in his dissent, observed that the Court, at a minimum, "purports to reserve the question" whether strict scrutiny applies to gender classification.¹²⁷ In describing the review of gender classifications, the majority throughout the opinion appeared to suggest that strict scrutiny might be appropriate under certain circumstances. The Court wrote that its post-*Reed* jurisprudence had not "equat[ed] gender classifications, for all purposes, to classifications based on race or national origin" ¹²⁸ It further explained that "[t]he Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin" ¹²⁹ The Court's careful choice of words suggests a deliberate attempt to leave open the possibility that it might choose to apply strict scrutiny in at least some circumstances in the future. The Court did not, however, discuss the circumstances under which a higher level of review might apply.

The Court in *VMI* declined to address the broader issue of single-sex education in general. Amici urged that single-sex colleges contribute to educational

123. *Cf. id.* at 2279.

124. *See id.* at 2280, 2287.

125. *Id.* at 2281.

126. *Id.* at 2282. In underscoring the right of the individual to equal protection, the majority's reasoning in *VMI* paralleled Justice Kennedy's recent concurrence in *J.E.B.*, finding that gender-based peremptory challenges, like those based on race, are unconstitutional. *See J.E.B. v. Alabama*, 511 U.S. 127, 151-54 (1994). The Supreme Court treated gender like race in examining whether peremptory strikes based on gender were constitutional. *See id.* at 135-36. There, the justification for permitting strikes based on race and gender were essentially the same, as both were based on stereotypical beliefs about the way people would vote or think. *See id.* at 139-40. The majority held that the court could not permit classifications whose defense rests on "the very stereotype the law condemns." *See id.* at 138 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The Court also examined the historical context for the use of peremptory strikes, noting that both blacks and women were excluded from jury service until only recently. *See id.* at 136. Justice Kennedy explained that the Equal Protection Clause is concerned with the rights of the individual and protects his or her right to be treated as an individual, not simply "as a representative of a racial or sexual group." *See id.* at 153.

127. *See VMI V*, 116 S. Ct at 2295 (Scalia, J., dissenting). Indeed, Justice Scalia argues that if the issue of level of review were to be reconsidered, the stronger argument would be that the standard should be reduced to the rational basis test. *See id.* at 2295-96 (emphasis added). In support of this novel suggestion, Scalia explains that the pre-*Reed* doctrine would more fully comport with the rational basis test under *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938), because women are not a "discrete and insular minorit[y]" unable to employ the political processes ordinarily relied on to protect minorities. *See VMI V*, 116 S. Ct. at 2296.

128. *Id.* at 2275 (emphasis added).

129. *Id.* at 2275 n.6 (emphasis added).

diversity and that some single-sex schools sought "to dissipate, rather than perpetuate, traditional gender classifications."¹³⁰ The Court explained that it did not question a state's ability to support evenhandedly diverse educational opportunities.¹³¹ Rather, the Court explained, its decision addressed only an educational opportunity which the lower courts found was "unique" and available only at the state's sole single-sex college.¹³² Because Virginia did not offer separate and substantially equal single-sex schools to men and women in an evenhanded fashion, the Court emphasized, as it did in *Hogan*, that VMI did not raise the question of "whether States can provide 'separate but equal' undergraduate institutions for males and females."¹³³

The Supreme Court in *VMI* indicated that gender-based classifications may be justified, however, if designed to redress past discrimination.¹³⁴ In rejecting the argument raised by women's colleges that striking down VMI's males-only policy would threaten the existence of women's colleges, the majority cited David Riesman, an expert for both VMI and The Citadel, who recognized that male colleges are likely to reinforce assumptions of male superiority in a world where men and women are not equal:

The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay.¹³⁵

As an historical matter, women have been excluded throughout American history from prestigious colleges such as VMI and The Citadel.¹³⁶ Unlike men's colleges, many women's colleges seek to compensate for the historical discrimination against women in education and the lack of gender equity in coeducational environments. Neither VMI nor The Citadel purports to compensate men for past discrimination; their exclusionary policies instead reflect outmoded notions of gender roles and stereotypes. To equate traditionally male military colleges with all-female schools designed to compensate women for past discrimination in education is tantamount to claiming that all-white colleges are the same as historically black colleges. VMI's argument that the fate of women's colleges rises and falls with that of the all-male military colleges deliberately ignored the social and historical context of single-sex education in this nation.

130. Women's College Brief, *supra* note 11, at 5; see also *VMI V*, 116 S. Ct. at 2276 n.7.

131. See *VMI V*, 116 S. Ct. at 2276 n.7.

132. See *id.*

133. *Id.* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 720 n.1(1982)).

134. See *VMI V*, 116 S. Ct. at 2276.

135. *Id.* at 2277 n.8 (citing CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION* 297-98 (1968)).

136. The undergraduate schools at Yale and Princeton became coeducational in 1969, followed by Brown and Dartmouth in 1972, Harvard in 1976, and finally Columbia in 1983. See BARNARD/COLUMBIA WOMEN'S HANDBOOK COLLECTIVE, *THE BARNARD/COLUMBIA WOMEN'S HANDBOOK* iv (1992).

Even assuming that single-sex education can be shown to compensate women for discrimination in education, a state may not rely on stereotypes about the attributes, interests, or abilities of men and women to defend single-sex education.¹³⁷ In *VMI*, for example, the Court rejected Virginia's argument that women benefited from a single-sex environment because men and women have "developmental differences" that justify a different educational environment.¹³⁸ A state could more easily show that a single-sex school meets muster under *VMI* if it can show that the school redresses differences in skills, abilities, or opportunities that have been caused by systematic discrimination in the educational system. The question remains as to whether girls-only schools are truly benign measures or whether, as argued below, they stigmatize women as deficient and perpetuate notions of difference that ultimately inure to women's detriment.

III. SINGLE-SEX SCHOOLS FOR GIRLS

A. Reinforcing Distinctions Through Segregation

Segregating girls in a separate school is an unnecessary and undesirable means to improve gender access and equity. In support of single-sex schools for girls, proponents of single-sex education cite research showing that in coeducational classrooms teachers pay more attention to boys than girls.¹³⁹ They also claim that girls in coeducational schools do not perform as well as boys, particularly in math and science.¹⁴⁰

Supporters of single-sex schools for girls understandably seek to improve education for young women and to eliminate stubbornly persistent inequities between males and females in the classroom. While few would claim that single-sex education is a panacea, or even the best long term solution, many would say they are frustrated by the failure of coeducation to treat girls fairly and prefer to rely on single-sex education in the meantime to maximize the opportunities available to girls today. Undoubtedly, all-female schools offer some women an effective and empowering education. The more troubling issue is whether the state should offer public single-sex schools, rather than permit single-sex schools to remain exclusively in the private sector.¹⁴¹ To permit a state to operate single-sex schools reinforces separation of the sexes and brands women as inherently different from and inferior to men in society.

As *VMI* recounts, separate schools for men and women were not created based upon the desire to treat women as equals.¹⁴² The history of single-sex education in this nation has been premised instead upon the belief that men and

137. See *VMI V*, 116 S. Ct. at 2275-76.

138. See *id.* at 2279.

139. See, e.g., HALL & SANDLER, *supra* note 13, at 7-9.

140. See Brief Amicus Curiae of Women's Schools Together, Inc., et al. at 14-22; *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107).

141. Justice Scalia asserted that *VMI* effectively eliminated private single-sex schools because many receive indirect federal assistance in the form of student loans, tax exemptions, etc. See *VMI V*, 116 S. Ct. at 2306-07 (Scalia, J., dissenting).

142. See *id.* at 2284-85.

women are fundamentally different, with differing educational needs.¹⁴³ As Justice Ginsberg explained, higher education was considered by leading experts of the time to be dangerous and inappropriate for women.¹⁴⁴ Experts claimed that scientific evidence established that women were physically and temperamentally not suited to the rigors of the academy.¹⁴⁵ The exclusion of women from educational opportunities was also rationalized by the different norms and expectations of men and women in society.¹⁴⁶ Separate education for men and women paralleled the separate spheres that each was expected to occupy.¹⁴⁷

While some claim that women occupy a different position because they have been discriminated against, others rely on essentialist notions and difference theories to claim that women are more likely than men to have different affective traits and needs.¹⁴⁸ According to these theorists, women's colleges permit women to benefit from learning in a community of peers that is more "relational" or non-hierarchical than coeducational or predominantly male environments.¹⁴⁹ By sponsoring sex-segregation in public schools, states may validate and perpetuate generalizations about "the way women are" which historically have been used to deny a host of opportunities to women. Even if a state claims that its support for all-female schools is based on its desire to remedy the differential treatment of women in chilly coeducational classrooms¹⁵⁰ rather than accommodate innate differences between men and women, the distinction is apt to be blurred in a society in which gender inequity still exists.

Because the classification of gender does not appear to be an instrument of power, equal protection jurisprudence erroneously assumes that gender classifications are not inherently invidious. Cynthia Fuchs Epstein disagrees. She explained that the social construction of gender represents the categories of male and female as dichotomous, bipolar opposites which invariably foster a belief that men and women are inherently different.¹⁵¹ Epstein observed that belief in gender difference permeates society, ranging from acknowledgment of physical differences to the assumption that men and women have different, and opposite, personality traits and affective characteristics.¹⁵² All societies use sex to differentiate their members, dividing the public and private spheres into men's and women's roles.¹⁵³ Gender distinctions rationalize the exclusion of women from power and opportunity as a natural consequence of gender difference. They also

143. See, e.g., *id.* at 2277, 2280-81.

144. See *id.* at 2277.

145. See EDWARD H. CLARKE, SEX IN EDUCATION: OR, A FAIR CHANCE FOR THE GIRLS 21-118 (1873) (discussing why biological differences between the sexes argue against coeducation).

146. See discussion *supra* notes 36-42 and accompanying text.

147. Cf. Jane Roland Martin, *Bound for the Promised Land: The Gendered Character of Higher Education*, 4 DUKE J. GENDER L. & POL'Y 3, 15-21 (1997) (discussing the education-gender system).

148. See GILLIGAN, *supra* note 52, at 22.

149. See discussion *supra* note 50-74 and accompanying text.

150. See BERNICE R. SANDLER ET AL., THE CHILLY CLASSROOM CLIMATE: A GUIDE TO IMPROVE THE EDUCATION OF WOMEN 65-91 (1996) (discussing strategies for remedying "the chilly classroom.").

151. See Cynthia Fuchs Epstein, *Tinkerbells and Pinups: The Construction and Reconstruction of Gender Boundaries at Work*, in CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY 232, 233-38 (Michèle Lamont & Marcel Fournier eds., 1992).

152. See *id.* at 232; see also Epstein, *supra* note 31, at 107-11.

153. See Epstein, *supra* note 151, at 232.

inevitably invite comparisons: the attributes, capacities, and roles assigned to men are more valued by society than those assigned to women.

The myth of difference has been used throughout history to segregate women in the private sphere and exclude them from power.¹⁵⁴ As Epstein explained, social science research that purports to find sex differences is not neutral or objective but replete with bias and methodological error.¹⁵⁵ It is easy to condemn *Bradwell* and a host of pre-*Reed* decisions as resting on outmoded gender norms and beliefs. But these paternalistic notions of women permeated the body of scientific literature widely accepted at the time.¹⁵⁶ The use of social science as evidence to justify the segregation of women in education is particularly dangerous. What is more subtle, however, are feminist claims of difference that similarly treat gender as dichotomous categories, and thus reinforce the myth of gender difference. In an effort to revalue the contributions of women, some feminists have sought to celebrate the value of attributes historically assigned to women by male society. Many of these theorists, however, accept as a given that men and women are bipolar categories of persons.¹⁵⁷ In proclaiming the desirability of traits ascribed to the female gender, these feminists reinscribe gender as a natural category.

VMI offers an invaluable lesson about the dangers of espousing difference as a rationale for separation. In their haste to preserve VMI's male-only tradition, the lower courts embraced without question the most blatant of gender stereotypes and generalizations offered by Virginia to exclude women. VMI's experts explained that women are "not capable of the ferocity requisite to make the program [at VMI] work."¹⁵⁸ Unlike men, women "respond more naturally to an ethic of care," premised on the notion that "no one should be hurt," rather than on the male egalitarian "ethic of justice."¹⁵⁹ If admitted to VMI's rigorous Corps of Cadets system, women would "break down crying" and suffer "psychological trauma."¹⁶⁰ Both trials in *VMI* were flashbacks in time to an era of romantic paternalism that disguised discrimination as benevolent protection.

Claims of difference are inherently dangerous. When invoked as a justification for denying women access to VMI, Virginia's claims of difference appeared disingenuous, an obvious rationalization for denying qualified women who would prefer a stressful educational experience from VMI. When invoked by well-meaning feminists or educators to justify sex-segregated education pro-

154. See discussion *supra* notes 36-39 and accompanying text.

155. See Epstein, *supra* note 151, at 234-35.

156. See CLARKE, *supra* note 145, at 21-118, 127 (1873) ("Identical education of the sexes is a crime before God and humanity that physiology protests against, and that experience weeps over."). In the book, which became the leading authority for the foes of coeducation, Clarke argued that colleges could not possibly afford to accommodate the biological needs of women because of the theoretical and clinical interference of menstruation on a classical education. See *id.*; see also PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 105 (1984) ("[O]ne sees the effect of the dispositions associated with gender," resulting in girls choosing more literary pursuits and boys choosing more scientific areas).

157. See, e.g., CAROL BELENKY ET AL., *WOMEN'S WAYS OF KNOWING* 76-99 (1986); GILLIGAN, *supra* note 52.

158. Brief for the Petitioner at 38, *VMI* V, 116 S. Ct. 2264 (1996) (No. 94-1941) (citations omitted).

159. *Id.*

160. *Id.*

grams, claims that women and men have "different ways of knowing,"¹⁶¹ speak in a "different voice,"¹⁶² or utilize different management techniques, while heard by feminists as validation of qualities historically undervalued and attributed to women, are heard by the rest of society as justifications for excluding women and treating them differently.

B. The Reinforcement of Generalizations

As in other contexts, claims about so-called differences between girls and boys in academic performance are based upon the erroneous belief that gender is a valid predictor of individual performance or traits. The use of gender as a category of classification appears so natural that claims of difference are accepted as objective truth. While accounts of the classroom as a chilly environment for girls and of the disproportionate lack of interest in math and science careers of girls appear well-founded,¹⁶³ gender is not a good predictor of academic performance.¹⁶⁴ Focusing on "gender differences" in academic achievement and interest in science and math is misleading at best: it obscures the significant effect of socioeconomic status in shaping students' educational experiences.¹⁶⁵

The Educational Foundation of the American Association of University Women (AAUW) commissioned the Wellesley College Center for Research on Women to study girls and education.¹⁶⁶ The AAUW issued a report in 1992 on the Center's major findings, entitled *How Schools Shortchange Girls*.¹⁶⁷ The report confirmed what many have observed: males receive more attention from teachers in the classroom than females: "[W]hether one looks at preschool classrooms or university lecture halls, at female teachers or male teachers, research spanning the past twenty years consistently reveals that males receive more teacher attention than do females."¹⁶⁸ Further, there is a tendency, beginning at the preschool level, to select classroom activities that appeal to boys' interests and to select presentation formats "in which boys excel or are encouraged more than girls."¹⁶⁹ Some experts, and many supporters of single-sex schools, claim that inattention to young women in the classroom tends to negatively affect their self-esteem and confidence, encourage silence, and discourage young women from pursuing predominantly male subjects such as science and math.¹⁷⁰ Two recent studies have found that the bias in favor of boys is particularly apparent in science classes.¹⁷¹

161. See BELENKY, *supra* note 157.

162. See GILLIGAN, *supra* note 52.

163. See, e.g., SANDLER ET AL., *supra* note 150, at 7-17, 33-35; Mary Baldwin Brief, *supra* note 79, at 8-20.

164. See Epstein, *supra* note 31, at 108-11; see also *infra* notes 194-202 and accompanying text.

165. See *infra* notes 206-220 and accompanying text.

166. See AM. ASS'N OF UNIV. WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS* iv-v (1992) [hereinafter AAUW REPORT].

167. See *id.*

168. *Id.* at 60.

169. *Id.*

170. See, e.g., SANDLER ET AL., *supra* note 150, at 7-17, 33-35; Mary Baldwin Brief, *supra* note 79, at 8-20.

171. See AAUW REPORT, *supra* note 166, at 70 (citing J. Kahle, *Why Girls Don't Know*, in WHAT

While the lack of attention to girls has been well documented, the effect of specific teacher behaviors on student performance and motivation has not. In other words, we know that boys receive more attention than girls in the classroom, but we do not know the cause or the most effective solution. The AAUW report suggested that more research in this area is needed.¹⁷² Moreover, focusing on gender reveals only a part of the story. Race and socioeconomic status also play important roles in identifying and explaining discriminatory treatment in the classroom. The AAUW report suggested that research on student-teacher interactions "has rarely looked at the interaction of gender with race, ethnicity, and/or social class."¹⁷³ The limited data that exists indicates that "while males receive more teacher attention than females, white boys receive more attention than boys from various racial and ethnic minority groups."¹⁷⁴

The evidence on the effect of low self-esteem and confidence among girls also appears to be mixed. According to the AAUW report, even though girls report being more anxious about tests than boys, their increased anxiety does not correlate with lower test performance.¹⁷⁵ Regardless of the effect on performance, the AAUW report said that a lack of confidence in math or science is "strongly correlated" with continuation of study in the subjects.¹⁷⁶ Overall, though, the AAUW report indicated that gender differences in the number of math and science courses taken were small.¹⁷⁷

Whether there is a gender difference in academic performance or achievement in part depends on how achievement and abilities are measured. The AAUW report concluded that "[t]here is considerable evidence that girls earn higher grades than boys throughout their school careers."¹⁷⁸ But in measuring the achievement of girls and boys, studies commonly relied on standardized test scores instead of grades.¹⁷⁹ There is ample evidence, however, that standardized tests are biased in favor of males.¹⁸⁰ As the AAUW report noted, questions of sex bias in the design and administration of tests must be considered when evaluating claims that test scores reveal gender differences in achievement.¹⁸¹ Standardized tests which are equally valid in measuring achievement can be developed which, depending on the test, will reveal that girls or boys score higher on average.¹⁸² The AAUW report explained that it is possible to create or eliminate sex "differences" in test scores simply by the selection of test

RESEARCH SAYS TO THE SCIENCE TEACHER—THE PROCESS OF KNOWING (M. Rowe ed., 1990); Valerie Lee, Sexism in Single-Sex and Coeducational Secondary School Classrooms, Presentation to the American Sociological Association (Aug. 9, 1991) (transcript on file with author).

172. See AAUW REPORT, *supra* note 166, at 70.

173. *Id.*

174. *Id.*

175. See *id.* at 56.

176. See *id.* at 28.

177. See *id.* at 26-27. The pattern of science courses taken, however, is somewhat different. Girls tend to take more advanced biology courses while boys tend to take more advanced physics and chemistry. See *id.* at 27.

178. *Id.* at 22.

179. See *id.* at 52.

180. See *infra* notes 189-205 and accompanying text.

181. See AAUW REPORT, *supra* note 166, at 52.

182. See *id.*

items.¹⁸³ Test items vary according to the skill areas that are tested, the format of the item (whether it is an essay question or multiple choice), and the item content and context (including the reference to gender and selection of test material that is more familiar to boys or girls).¹⁸⁴ The AAUW report concluded that “[t]he relative emphasis placed on different skill areas within a content area determines if a test will help minimize or maximize sex differences.”¹⁸⁵ For example, girls perform better than boys on average on mathematics tests which emphasize computational skills, logic, and combined arithmetic and algebra skills.¹⁸⁶ On the other hand, boys outperform girls on average on mathematics tests which emphasize word problems and combined arithmetic and geometry skills.¹⁸⁷ Similarly, “[g]irls tend to score higher on essay or open-ended items, while boys tend to score higher on multiple-choice items.”¹⁸⁸

The Scholastic Aptitude Test (SAT) exemplifies the potential for gender bias in standardized tests. While SAT scores are designed to predict college performance, they in fact underpredict women’s college grades and overpredict men’s.¹⁸⁹ As the AAUW report showed, women tend to receive higher grades in college than men with the same SAT scores.¹⁹⁰ Reliance on SAT scores has practical consequences for women: while young women on average receive higher grades in high school and college, young men are twice as likely to receive college scholarships that are based on test scores.¹⁹¹ As the AAUW report concluded, bias in testing results in “an inaccurate picture of girls’ and boys’ abilities.”¹⁹² The AAUW report recommended against relying exclusively on standardized test scores when evaluating the relative skills and abilities of girls and boys.¹⁹³ With that cautionary note, the AAUW report noted that gender differences which do exist in math performance are small and declining.¹⁹⁴ A recent study of twelfth-grade students’ scores on math and verbal achievement tests revealed that gender accounts for less than two percent of the difference in math scores between girls and boys.¹⁹⁵ Moreover, the differences occurred largely in the top end of

183. See *id.* at 55.

184. See *id.* at 54.

185. *Id.*

186. See *id.*

187. See *id.*

188. *Id.* at 55.

189. See *id.* at 56.

190. See *id.*

191. See *id.* at 52.

192. *Id.* at 57.

193. See *id.*

194. See *id.* at 24.

195. Patricia Campbell, an educational consultant who specializes in the area of gender equity testified as an expert witness on behalf of Shannon Faulkner in The Citadel litigation. See Deposition of Patricia Campbell, Ph.D. at 2-3, *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (No. 2:92-1674-2). We asked her to examine the extent to which a variety of factors, including gender, accounted for variation in national test scores of twelfth grade students in math. See *id.* at 168. The purpose of the evaluation was to use recent data to test the common perception that there is a significant gender gap in math. See *id.* Dr. Campbell used the underlying data from a 1993 study of high school achievement of twelfth grade students conducted by the National Assessment of Educational Progress in 1992. See *id.* at 171. The data consists of a representative sample of tens of thousands of students. See *id.* To test the relative importance of gender, Dr. Campbell evaluated the test scores to determine the amount of variation in

scores.¹⁹⁶

The AAUW report further observed that the vast majority of observable differences were attributable to factors that were not indicative of true difference: the age of the sample, how academically selective the test was, and which cognitive level was tested.¹⁹⁷ One meta-analysis test showed that eighty-seven percent of the already insignificant variance in scores was attributable to these three factors.¹⁹⁸ When scores were considered by age of the student, differences in variation also appeared.¹⁹⁹

Many studies have concluded that differences in group performance of boys and girls are minimal or non-existent at the elementary and middle school level.²⁰⁰ While differences are larger at high levels of achievement, the overall variation due to gender is still statistically insignificant and declining.²⁰¹ While SAT test scores continue to reflect average differences in performance of young women and men in mathematics, the gap has been steadily declining.²⁰² Moreover, it is important to keep in mind that the SAT as a standardized test "finds larger differences than other standardized tests."²⁰³ As discussed above, the SAT is not a reliable measure of academic achievement or potential.²⁰⁴ Moreover, the differences in SAT performance may be a result of materials provided to students prior to the test which advise students that girls do not perform as well as boys on the test.²⁰⁵

While much of the focus among feminists and many educators has been on the effect of gender, many other categories account for substantially greater variation in test scores, including socioeconomic status (SES) and race.²⁰⁶ The

test scores that occurred when the students' scores were considered according to: (a) the gender of the students; (b) the race of the student; (c) whether the school that the student attended was public or private; and (d) whether the student was from the northeast or southeast area of the nation. *See id.* at Exh. 2. In measuring the amount of variation, Dr. Campbell used the categories of scores developed by the National Educational Longitudinal Survey, which reports students' scores as advanced, proficient, basic, and below basic. *See id.* at 163-77. For each variable, she evaluated the percentage of variation in the math scores that occurred when each of the four variables was considered. *See id.* at Exh. 2. Significantly, the data did not permit evaluation of the effect of socioeconomic status on math performance. *See id.* The purpose of the analysis was not to identify the factors which causally effect performance, but merely to evaluate common beliefs about the role of gender in math scores. *See id.* at 163-77. Contrary to popular belief, this data did not reveal a "gender gap" in math scores. *See id.* at Exh. 2. In terms of prediction, race accounted for the greatest amount of variation at the proficient, basic, and below basic levels. *See id.* Whether the school was public or private was the next best predictor, with the regional location of the school next. *See id.* Unlike the other three variables, gender resulted in very little variation in the math scores of these twelfth grade students. *See id.*

196. *See* AAUW REPORT, *supra* note 166, at 25.

197. *See id.* at 24.

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.* at 25, 30-31.

203. *Id.* at 31 (citations omitted).

204. *See supra* notes 189-93 and accompanying text.

205. *See* AAUW REPORT, *supra* note 166, at 131.

206. *See, e.g.,* Peter Applebome, *Minorities Falling Behind in Student Achievement: Gap in Scores Grows After Years of Progress*, N.Y. TIMES, Dec. 29, 1996, at 9 (reporting that minority students are falling behind white students in standardized test results).

AAUW concluded that SES was the best predictor of both grades and test scores.²⁰⁷ Gender may favor either boys or girls, depending on the race and SES of the sample tested.²⁰⁸ The combined effect of SES, race, and gender has not received much scholarly or public attention.²⁰⁹ However, the AAUW study reported that among high SES eighth-grade students, girls were less likely to be in advanced math than boys, and no more likely than boys to be in advanced reading.²¹⁰ Among low SES students, girls outperformed boys. Low SES eighth-grade girls, for example, were "less likely than boys to test below basic levels in reading and math."²¹¹ Low SES boys are more likely to have repeated a grade than low SES girls.²¹² Indeed, fully "one-third of all low-SES boys are held back at least one grade."²¹³ The AAUW report concluded that there is a "marked bipolarity" in the relative achievement of low SES girls versus high SES girls.²¹⁴ "[T]hose of low socioeconomic status are more likely to do better than similar boys, while those at high socioeconomic status are only as likely and often less likely to do as well as boys."²¹⁵

Some studies have reported fewer gender differences in mathematics for minority students than for white students.²¹⁶ Again, SES made a difference. While high SES boys regardless of race "clearly do better than girls . . . [t]he differences are most striking among black students."²¹⁷ This does not mean, of course, that low income girls or children of color are doing well. Nearly twenty-nine percent of "low-SES black girls also were held back at least one grade."²¹⁸ The AAUW report stated that even after SES was taken into account, "racial and ethnic differences persist in both data sets."²¹⁹

Claims about gender difference are based upon the popular misconception that gender is a valid predictor of academic achievement, rather than a product of gender stereotypes. The empirical data do not support the claim that gender or race is most correlated with student performance: it is their socioeconomic status.²²⁰ Knowing these facts, it is clear that while the Young Women's Leadership School will undoubtedly provide its students access to valuable educational resources, it would likely benefit any student, regardless of gender or race.

If a state sees its students in terms of their gender or race, rather than their socioeconomic status, it will fail to address the very real need for more resources

207. See AAUW REPORT, *supra* note 166, at 33.

208. See *id.* at 33-36.

209. See *id.* at 33.

210. See *id.* at 34.

211. *Id.*

212. See *id.* at 35.

213. See *id.*

214. See *id.* at 34.

215. *Id.*

216. See *id.* at 25.

217. *Id.* at 35. The AAUW suggested that the difference among high SES black students may be due to the fact that these students were more likely to be in desegregated schools. See *id.* There is evidence that black girls do not do as well as black boys in desegregated schools. See *id.*

218. *Id.*

219. *Id.*

220. See *id.* at 33.

and financial support for education. Separating children on the basis of gender or race may help some, but it will divert limited resources from more cost-effective solutions that have the potential to reach a greater number of people.

In *Garrett v. Board of Education*,²²¹ the Eastern District of Michigan preliminarily enjoined the Detroit Board of Education from excluding females from three public academies which were formed to address high unemployment rates, school dropout levels, and homicide among urban African American males.²²² The academies were prepared to teach 250 boys from preschool through fifth grade, and then phase in programs for sixth through eighth grades.²²³ The academies, developed by a private organization, planned to offer special programs including an afrocentric curriculum, a "Rites of Passage" class designed for adolescent males, career preparation, an emphasis on male responsibility, mentors, individualized counseling, and student uniforms.²²⁴

The American Civil Liberties Union and National Organization of Women (NOW) challenged the schools' admission policies, arguing that the Board of Education deliberately chose to ignore the rights of girls in the public school system, contrary to the advice of state governmental authorities and in violation of federal law.²²⁵ The Board argued that the academies served a valid purpose because coeducation had resulted in lower achievement levels for boys than for girls.²²⁶ The male academies, the Board argued, would improve boys' performance.²²⁷ Defendants further argued that the Board had developed alternative programs housed in single-sex schools that addressed the specific needs of females, such as teen pregnancy.²²⁸

In granting preliminary relief, the district court found that the all-male academies likely violated the Equal Protection Clause.²²⁹ The court agreed that the state's objective was important, but that the Board of Education had failed to prove that the exclusion of girls was necessary to combat unemployment, dropout, and homicide rates among urban males.²³⁰ The court found that there was no evidence that the school system failed boys because girls were in the classroom; the system failed girls as well.²³¹ While meeting the needs of inner-city males was an important objective, the court held that it was "insufficient to override the rights of females to equal opportunities."²³²

The analysis of the district judge in *Garrett* applies equally in the case of single-sex schools for girls: given that the schools have failed all students, does excluding boys from a valuable educational experience substantially advance the state's interest in educating its citizenry? Focusing remedial attention on the

221. 775 F. Supp. 1004 (E.D. Mich. 1991).

222. See *id.* at 1006, 1007.

223. See *id.* at 1006.

224. See *id.*

225. See *id.* at 1005.

226. See *id.*, at 1007.

227. See *id.*

228. See *id.*

229. U.S. CONST. amend. XIV, § 1.

230. See *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1007-08 (E.D. Mich. 1991).

231. See *id.* at 1008.

232. See *id.* at 1014.

“wrong” category not only misunderstands the problem, it diverts attention from more effective solutions that are more likely to improve academic achievement.

C. The Alleged Superiority of Single-Sex Educational Environments

Even assuming that there is a legitimate need to remedy past discrimination against girls in public education, single-sex education for girls will not substantially advance that objective. Supporters of single-sex schools for girls claim that an environment that focuses solely on girls is a more conducive environment for learning. All-female classes allegedly remove the pressure to conform to societal expectations that do not reinforce high academic achievement. With boys absent, teachers may be free to focus all of their attention on girls. Moreover, female students have greater opportunities for leadership roles. Supporters of single-sex schools claim that sex-segregated education contributes to higher academic achievement, self-esteem, and confidence in young women.²³³

As in *Garrett*, the relevant question here is whether the absence of male students will substantially improve girls' educational performance and experience. The empirical evidence as to the relative effectiveness of single-sex secondary education is ambiguous.²³⁴ Proponents of single-sex education rely on a number of studies of single-sex Catholic primary and secondary schools and private independent schools which indicate that single-sex education is beneficial for girls but provides little or no benefits for boys (and possibly has negative effects).²³⁵ While one might disagree with the methodology or results of these studies, the crucial question is whether these studies can be extrapolated to public schools.

Valerie Lee, a professor of education at the University of Michigan, has researched single-sex secondary education for several years.²³⁶ She has conducted two longitudinal studies, using data from the United States Department of Education's High School and Beyond, comparing Catholic students in single-sex and coeducational high schools.²³⁷ The first study, published in 1986, found that girls attending girls' schools “were favored by that experience in a number of academic and affective domains.”²³⁸ A second study published in 1990 followed the performance of a group of students and found that many favorable effects of attending Catholic girls' secondary schools were sustained for the students in college, even though very few of the students attended either single-sex or Catholic colleges.²³⁹ Thus it was difficult to determine whether the positive effects resulted from the students' secondary school experience, or from their college experience.

233. See *VMI I*, 766 F. Supp. at 1435.

234. See discussion *supra* notes 163-220 and accompanying text.

235. See, e.g., Valerie Lee, *Single-Sex Schooling: What is the Issue?*, in SINGLE-SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH 39 (Dec. 22 Draft Report) (Office of Educ. Res. & Improvement, U.S. Dep't of Educ., 1992).

236. See *id.* at 39.

237. See *id.* at 40.

238. *Id.* at 40.

239. See *id.*

Having studied only Catholic schools, Lee decided to compare private, independent single-sex schools to determine whether the findings for Catholic schools were similar to those in the independent schools.²⁴⁰ She collected and analyzed extensive data on students, teachers, classrooms, and schools in a stratified, nationally representative random sample of sixty schools that belonged to the National Association of Independent Schools (NAIS) for the 1988-89 school year (twenty girls' schools, twenty boys' schools, and twenty coeducational schools).²⁴¹ She employed a similar set of statistical controls for student background and school contexts, including adjustments for school selectivity, an important characteristic of NAIS schools.²⁴² As with the Catholic schools, Lee analyzed an array of variables, including students' course work, achievement, perceptions of school climate, school-related values and experiences, and personal and social values.²⁴³

Lee reported that "analysis of the relative effectiveness of single-sex and coeducation in NAIS schools has produced equivocal results."²⁴⁴ The results for NAIS schools suggested that there were few positive effects from single-sex schools, and some negative effects.²⁴⁵ Moreover, "there is no consistent pattern of results favoring either single-sex or coeducational schools, either for girls or boys."²⁴⁶ Based on the differences in results between Catholic and private schools, Lee suspected that the effects of certain types of single-sex schools are not generalizable across sectors.²⁴⁷ She raised the crucial question posed by YWLS: is the existing research on single-sex schools, almost all of which is based on private schools, applicable to inner-city youth? Given the apparent lack of generalizability of the data, the answer might well be no.

Lee's research raised another troubling issue. In her NAIS study, she and her team paid two to three day visits to a sample of twenty-one of the sixty schools, most of which was spent observing classes.²⁴⁸ To her surprise, Lee observed incidents of sexism in close to half the classes observed, noting as well that none of the schools was free of sexism.²⁴⁹ Lee concluded that "[t]he absence of one sex in single-sex classrooms does not ensure that sexism will not occur—in fact, the most serious incidents we observed were in all boys' classes with male teachers."²⁵⁰ Lee observed teachers in girls' schools attempting to accommodate girls' purported "relational" style by stereotyping girls, avoiding putting demands on girls, avoiding aggressive teaching, "over-anticipating academic problems and offering help before it was requested," and treating them "in a somewhat infantile and overly 'lady-like' manner."²⁵¹ While most of the sexist

240. *See id.* at 41.

241. *See id.*

242. *See id.* at 42.

243. *See id.*

244. *See id.* at 41.

245. *See id.* at 42.

246. *Id.*

247. *See id.*

248. *See id.* at 43.

249. *See id.*

250. *Id.*

251. *See id.*

behavior observed in girls' schools occurred in only two of seven schools, which were not very demanding academically, the assumption that girls' schools are free of sexism is unwarranted.²⁵²

Whether YWLS, or any single-sex school for girls, can demonstrate that it is likely to enhance girls' performance as compared to coeducational schools remains to be seen. What is clear, however, is that it is not the only method of improving gender equity and performance in schools. There is evidence that girls' interest in math and science can be improved by a variety of interventions, including career conferences focusing on math and science, summer math and science programs, and residential science institutes for girls.²⁵³ For example, the AAUW report says that a group of "average" minority junior high school girls who attended a four-week summer program on math and science "increased their math and science course-taking plans an average of forty percent."²⁵⁴ Another study evaluated the effect of a one-day career conference and found that "six months after attending the conference, girls' math and science career interests and course-taking plans were higher than they were prior to the conference."²⁵⁵

In addition to special interventions, simple teaching techniques can dramatically improve gender equity in the classroom. Education experts have developed a range of recommendations and techniques that teachers can employ to treat boys and girls more equally in the classroom: for example, pausing before calling on students, which encourages girls to volunteer, or advising students to take a minute to consider a question before responding, which similarly increases girls' participation.²⁵⁶

Given the availability of successful alternatives to single-sex schools, it is difficult to argue persuasively that the state must resort to segregating girls in order to offer them an education free of discrimination. The problem is not with the girls; the problem is with the classroom and the school system. As argued below, to segregate girls is to give up on them and to send the message that the responsible adults in society are unable (or unwilling) to prevent discrimination in our public schools. That is very disempowering indeed.

D. Compensatory Measures or Reversion to Traditional Gender Norms?

While many question the effectiveness of assimilation as a tactic for equality, the decisions to fund single-sex programs for women at Mary Baldwin and Converse Colleges, and to create a new girls' school in Harlem, did not result from informed debate or a genuine concern about achieving gender equity, but from private organizations and individuals with conservative social agendas. While Virginia and South Carolina claimed that their leadership programs were designed to provide women with a superior education,²⁵⁷ the programs were

252. See *id.* at 44.

253. See AAUW REPORT, *supra* note 166, at 29.

254. See *id.*

255. *Id.*

256. See SANDLER ET AL., *supra* note 150, at 75-86.

257. Brief Amici Curiae for the State of South Carolina et al. at 19-20, *VMI V*, 116 S Ct. 2264 (1996) (Nos. 94-1941) [hereinafter *The Citadel Brief*].

actually designed to rescue VMI and The Citadel from court decisions finding an equal protection violation. Both programs were based upon, and reinforced, traditional gender norms. Like the leadership programs at Mary Baldwin and Converse College, supporters of YWLS likewise assume that women have different educational needs that are better served in a supportive and nurturing educational environment.²⁵⁸ While public officials now defend the school under a compensatory rationale,²⁵⁹ there is little evidence that this is the true purpose of the school.

The move to reinstitute single-sex education in New York City did not originate with elected officials, but with a well funded, conservative thinktank with a political agenda of privatizing schools.²⁶⁰ Consideration of the complicated issues raised by single-sex education for women should include the convergence of interests that these gender classifications serve. The role of the Manhattan Institute in formulating and advocating YWLS likewise raises substantial questions about the propriety of state officials using private funds and resources donated by private interests who seek to resurrect single-sex education to further traditional gender norms. Education falls within the province of state and local authorities, who are supposedly able to represent the interests and needs of their constituents. Virginia and South Carolina argued that states should be free to determine how best to meet the education needs of their citizens, and to exercise their discretion in how to use limited funds to offer a range of education programs that best meets the needs of most students.²⁶¹ In this world of states' rights, education systems are described as smorgasbords of choice and diversity. When a private donor earmarks certain funds or resources for a particular education program, however, there is danger that the state may make education policy decisions that are not based on the best interests of the community, but on the agenda of private interests. In reality, the power of influential and wealthy private interests to advance their political agenda at the expense of the education interests of minority groups can be substantial.

Private funding of programs that improve access of all students to a high quality education may be relatively benign. However, private funding of programs that are targeted to benefit certain groups of students should be scrutinized to insure that the program does not reinforce existing inequalities. The VMI and Citadel cases illustrate the danger of permitting states to use private funds to preserve single-sex education for men only. The defense of these all-male institutions was subsidized by their alumni, who contributed millions of dollars to preserve their all-male status.²⁶² After the Fourth Circuit held that VMI and The Citadel must remedy their unlawful exclusion of women,²⁶³ alumni

258. Julia Cohen, Esq., Remarks at the Cardozo Law School (Oct. 31, 1996) (transcript on file with author).

259. See Steinberg, *supra* note 8, at B3.

260. See *id.*

261. *Faulkner v. Jones*, 855 F. Supp. 552, 560 (D.S.C. 1994), *aff'd in part modified in part*, 51 F.3d 440 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 352 (1996); *VMI I*, 766 F. Supp. at 1409; Brief for Cross-Petitioners, *VMI V*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107).

262. See Vojdik, *supra* note 48, at 1-2.

263. See *VMI II*, 976 F.2d at 892; *Faulkner v. Jones*, 51 F.3d 440, 450 (4th Cir. 1995).

reached deep into their pockets and committed millions more to create the "leadership" programs for women at Mary Baldwin and Converse Colleges.²⁶⁴

Following the announcement of the creation of YWLS, a wake of public controversy ensued, prompting the New York City Board of Education to schedule a public hearing to discuss the proposal.²⁶⁵ The hearing was held just days after the plans became public, with scant time to meaningfully assess the need or desirability for a public girls' program. In response to complaints by civil rights organizations that *VMI* prohibits public single-sex schools, school officials defended the school's exclusionary policy by asserting that girls in single-sex schools perform better in math and science than girls in coeducational schools.²⁶⁶ The Board of Education, under the leadership of a Republican mayor who proposed three weeks later to send public schoolchildren to Catholic schools, endorsed the plan and voted to expand it into an all-girls' high school over the next few years.²⁶⁷

The New York Civil Liberties Union (NYCLU), NOW, and the Coalition for Civil Rights, responded by filing an administrative complaint with the federal Department of Education in September challenging the all-female school.²⁶⁸ Echoing Justice Scalia's dissent in *VMI*, these civil rights organizations claim that *VMI* prohibits single-sex education.²⁶⁹ Their administrative complaint alleged that the school violated Title IX's²⁷⁰ prohibition against the creation of new single-sex schools or programs.²⁷¹ It further alleged that the Board of Education did not create the girls-only school to serve a compensatory purpose and that the Board was seeking to exclude boys solely on the basis of gender.²⁷²

The announcement of the establishment of YWLS has sparked a heated controversy over whether, under *VMI*, states may or should offer single-sex primary or secondary schools for girls for the ostensible purpose of improving their educational experience. Contrary to the dire predictions of the defendants, the Court did not hold in *VMI* that single-sex education is per se unconstitutional, nor ensure that it is "functionally dead."²⁷³

While *VMI* does not per se prohibit public girls' schools, it is nevertheless doubtful that New York school officials will be able to demonstrate that public schools for girls serve an "exceedingly persuasive justification."²⁷⁴ Under *VMI* and *Hogan*, the "mere recitation of a benign [or] compensatory purpose" or other

264. See The Citadel Brief, *supra* note 257, at 5-6; Vojdik, *supra* note 48, at 2 n.7.

265. See Steinberg, *supra* note 8, at B3.

266. See *id.*

267. See *id.*

268. See Administrative Complaint at Exh. B, National Org. for Women v. New York City Bd. of Educ. (Dep't of Educ. Aug. 22, 1996) [hereinafter Complaint].

269. See *id.* at 1 & Exh. B.

270. 20 U.S.C. §§ 1681-88 (1994).

271. See Complaint, *supra* note 268, at 1.

272. See *id.* at 1.

273. See *VMI* V, 116 S. Ct. at 2306 (Scalia, J., dissenting) (arguing that the risks and costs associated with litigating the constitutionality of single-sex education programs are too high for states to continue operating or implementing such programs).

274. *Id.* at 2267.

governmental objective will not be accepted at face value.²⁷⁵ Courts must examine the facts to determine whether the proffered justification is the actual purpose of the single-sex program.²⁷⁶ In this case, it is not clear that New York City school officials agreed to create YWLS to redress past discrimination in public education. From the beginning, the proposal and plans for the girls' school were withheld from the public, making it difficult to determine the actual purpose of the school. While school officials now claim that the school seeks to improve girls' performance in math and science,²⁷⁷ there is no evidence that this was the actual purpose of the school rather than a post hoc rationalization in the face of threatened litigation by the NYCLU and NOW.

Before filing the complaint with the Department of Education, the NYCLU and NOW wrote to the Board of Education to advise it that they considered the school in violation of Title IX²⁷⁸ as well as the Supreme Court's decision in *VMI*, which the NYCLU and NOW construed to prohibit public single-sex schools for women as well as for men.²⁷⁹ In response to the NYCLU and NOW letter, counsel for the Board of Education stated that neither the Chancellor nor the Board had made a final determination regarding the creation of the girls' school.²⁸⁰ The Board's counsel disagreed, however, that *VMI* or *Hogan* would prohibit the creation of the school.²⁸¹ The letter does not assert that the school is intended to serve a remedial or compensatory objective.²⁸²

After the NYCLU and NOW filed their administrative complaint, the Board of Education for the first time advised the press that the girls' school was intended to benefit girls, whom it claimed perform better in math and science if boys are not in the same classroom. The Board cited general research (which it did not identify) which purportedly shows that some girls do not perform as well, or participate as much, in coeducational classrooms.²⁸³ The Board also claimed that the fifty-student class for YWLS had already been filled for Fall 1996.²⁸⁴ While the school stated that it would accept applications from boys, the Board "reserved" a decision on whether to admit boys in the future.²⁸⁵

The Board of Education never sought the advice or counsel of the Chancellor of Education's Task Force on Sex Equity in New York Schools, which has been monitoring gender equity in the public schools since 1983.²⁸⁶ The Task Force

275. See *id.* at 2277 (citations omitted).

276. See *id.*

277. See Jacques Steinberg, *Rights Groups Seek to Bar Girls-Only School*, N.Y. TIMES, Aug. 23, 1996, at B2.

278. 20 U.S.C. §§ 1681-88.

279. See Letter from Norman Siegal, Executive Director of the NYCLU, and Christopher Dunn, Acting Legal Director of the NYCLU, to Rudolph F. Crew, Chancellor, New York City Board of Education (July 15, 1996) (on file with the *Duke Journal of Gender Law & Policy*).

280. See Letter from Lawrence Becker, Counsel to the Chancellor of the New York City Board of Education, to Norman Siegal, Executive Director of the NYCLU (July 23, 1996) (on file with the *Duke Journal of Gender Law & Policy*).

281. See *id.*

282. See *id.*

283. See Steinberg, *supra* note 277, at B2.

284. See *id.*

285. See Steinberg, *supra* note 8, at B3.

286. See REPORT FROM THE CHANCELLOR'S TASK FORCE ON SEX EQUITY, THE GENDER GAP IN NEW

issued a report on the status of girls' achievement in 1994 which included a number of recommendations to the Board of Education for improving gender equity.²⁸⁷ None of the recommendations included offering girls single-sex education.²⁸⁸ The Task Force proposed, for example, that teachers receive training in pedagogical methods to use in the classroom to promote girls' participation and achievement.²⁸⁹ Moreover, in 1995, the Board refused to approve \$500,000 to fund junior varsity athletics for girls in New York City schools, despite the consensus among experts that participation in athletics has a positive effect on girls' self-esteem and confidence.²⁹⁰ The Board also refused to require its teachers and administrators to receive training in nondiscrimination and equal opportunity regulations, training which federal regulations specify as mandatory.²⁹¹ The Board's previous lack of commitment to issues of gender equity and improving the quality of girls' education undercuts its recent attempt to justify the girls-only school as compensatory.

The mission and curriculum of the school is also not consistent with an attempt to provide disadvantaged girls remedial education in math or science. A document entitled *The Young Women's Leadership School in Community District 4*, prepared prior to July 16, 1996, describes the goals and methodology of the girls' school.²⁹² As described in the document, the school does not reflect any compensatory purpose or plan for improving girls' underperformance in science and math.²⁹³ Rather, the school purports to address the "complexities" of modern life through a demanding and rigorous curriculum.²⁹⁴ The document claims that "[o]ur society is changing in ways that are unprecedented; children are subject to influences that did not even exist in previous generations. It is clearly a time when schools need to redefine the ways in which they prepare our young women to thrive amid the complexities of modern life."²⁹⁵ The document does not identify these "influences" or "complexities" of modern life. The description of the school also does not suggest that its mission is to improve the girls' academic performance or to rectify past discrimination against young women in co-educational schools. The document instead repeatedly refers to the need for challenging and demanding curricula to prepare students for college and to "instill in the students the characteristics of intellect and spirit that will make them leaders of their generations."²⁹⁶ The document claims that the girls' school will offer a "demanding course of study in the middle school (grades seven and eight) which will expose students to a broad knowledge base and prepare them

YORK CITY PUBLIC HIGH SCHOOLS: SIGNIFICANT DIFFERENCES ON THE BASIS OF SEX IN ENROLLMENTS, MATH AND SCIENCE ACHIEVEMENT, AND STAFFING 1 (1994).

287. See *id.* at 23-26.

288. See *id.*

289. See *id.*

290. See Interview with Rose Korten, Deputy Director for High School Sports, Board of Education of the City of New York, in New York, N.Y. (Sept. 18, 1996) (transcript on file with author).

291. See Comments by Tanya Lewis, Director of the Office of Equal Educational Opportunity for the New York City School Board, in New York, N.Y. (Sept. 18, 1996).

292. See Complaint, *supra* note 268, at 4 & Exh. D.

293. See *id.* at Exh. D.

294. See *id.*

295. See *id.*

296. *Id.*

for the scholastic commitments expected in our college preparatory upper school (grades nine through twelve).²⁹⁷ The document states that the school will offer “advanced study,” including advanced placement courses, in its high school program, “a time when academic expectations are at their most unyielding.”²⁹⁸ Admission to the high school is not automatic; a student must “fulfill stringent requirements” before being admitted.²⁹⁹

As described in the document, the school does not purport to address any special or unique needs of young women. Instead, it will “attend to the developmental needs specific to pre and early adolescents” and seek to “capitalize on the intellectual curiosity and the creative spirit which are inherent in everyone.”³⁰⁰ The curriculum appears no different than one would expect at an independent private school.

While the city now asserts that the school will focus on math and science, the document does not emphasize either subject or describe any plans for how to improve girls’ interest in these subjects. Instead, the curriculum appears oriented to the liberal arts and fine arts. For example, the middle school will offer studies in “the liberal arts, literature, social sciences, mathematics, science, library science, computer, health, visual arts, music, drama, and physical education.”³⁰¹ The document does not offer any details about the math or science offerings; instead, it describes the role of culture and art. It explains that the school “will make frequent use of New York City’s cultural resources,” offer advanced study in “all academic, artistic, and physical disciplines,” and offer high school students “the opportunity to perform and assist in two major theater productions each year.”³⁰²

While the school will offer and encourage students to participate in extra-curricular activities, there are no stated plans to offer any math or science clubs or interest groups except a computer club for middle school students.³⁰³ Instead, its offerings include such activities as a literary magazine, social action committee, and drama club.³⁰⁴ High school students are required to perform sixty hours of community service and will be placed in settings such as health care facilities, hospitals, “medicine scientific research institutions,” parks departments, and universities and colleges.³⁰⁵

In addition to emphasizing academics, the school for girls will offer its students access to unique and valuable resources. The faculty will for the most part have advanced degrees, in both the field of education and in their own disciplines.³⁰⁶ The school will offer “a project-oriented curriculum which enables [students] to apply facts and concepts so that knowledge is lively and has pur-

297. *See id.*

298. *See id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *See id.*

304. *See id.*

305. *See id.*

306. *See id.*

pose,”³⁰⁷ classes that are “discussion based rather than teacher dominated,”³⁰⁸ and individual weekly conferences with a faculty advisor.³⁰⁹ Quite obviously, these features are beneficial for all students, rather than just girls. Based on this description, the girls’ school seems more like a highly selective private school on the Upper East Side of Manhattan rather than a public school for minority females in Harlem which is committed to a math and science centered curriculum.

IV. CONCLUSION

The battle for gender equity in our public schools is essential to assure women access to social and economic power. Public education not only teaches skills that are essential for later success, but shapes our daughters’ sense of identity and self-agency while transmitting cultural norms and values. Historically, states have excluded women from public and higher education, enforcing traditional gender norms that barred women from the public sphere.³¹⁰ That discrimination against women still exists in coeducational schools is not surprising, especially in light of the power of education to awaken the minds and aspirations of students.

In our haste to remedy the chilly classroom environment that faces many of our daughters,³¹¹ however, we should be wary of reinvoking essentialist notions of men and women that historically have been used to justify state enforced separation of women in education. Rather than seek to create a truly inclusive educational system, proponents of single-sex schools seek to resurrect a classificatory scheme that mirrors the benevolent paternalism of the last century.³¹² Segregation of students based on their sex is not a new idea, but is a return to the past when the state used its coercive power to enforce traditional gender roles and norms.

Every female student has the right to be free from discriminatory treatment and the right to expect that society will insist that those in charge of the classroom—teachers and administrators alike—will enforce that right. There is no conclusive evidence that segregating women in separate schools will improve their educational achievement. Segregated schools are not culturally neutral; separate but equal historically has been a code for inferiority. Single-sex schools for girls will not eliminate discriminatory treatment in coeducational schools nor help male students overcome harmful stereotypes about the roles and abilities of women. In contrast, there are a host of educational reforms which advance gender equity by fostering true inclusion, while simultaneously reinforcing the value of diversity in our culture. Rather than embrace an exclusionary practice from the past in the name of reform, we should demand that our tax dollars be spent to remedy gender inequity and teach our students that we will not tolerate discrimination.

307. *Id.*

308. *Id.*

309. *See id.*

310. *Cf. VMI V*, 116 S. Ct. at 2277-78 (discussing the history of exclusion of women from institutions of higher education).

311. *See HALL & SANDLER*, *supra* note 13, at 3.

312. *See supra* notes 36-39 and accompanying text.